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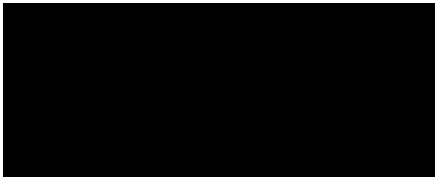
U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street N.W.
Washington, D.C. 20536

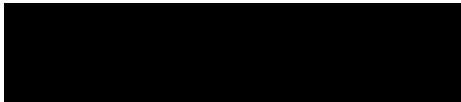


JAN 27 2004

File: WAC 02 051 53313 Office: CALIFORNIA SERVICE CENTER

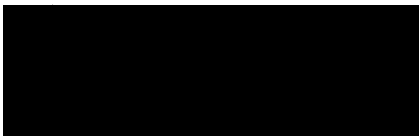
Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The case will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a realty company. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel asserts that the petitioner has demonstrated that it has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

(2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests primarily upon whether the petitioner's ability to pay the wage offered has been established as of the petition's priority date, and continuing. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is December 29, 1997. The beneficiary's salary as stated on the labor certification is \$17.18 per hour or \$35,734.40 annually. The evidence shows that the petitioner is a sole proprietorship.

In this case, the petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On February 28, 2002, the director requested further evidence relevant to the petitioner's ability to pay the offered wage. He instructed the petitioner to submit copies of annual reports, signed federal tax returns, or audited financial statements from 1997 to the present. The director

also requested copies of the last three years of the beneficiary's W-2s issued by the petitioner. The director noted that the initial evidence indicated that the petitioner had employed the beneficiary since 1994. In response, the petitioner's owner submitted copies of his Form 1040, U.S. Individual Income Tax Returns for the years 1997, 1998, 1999 and 2000 including Schedule C that reflects business income. The information provided reflects the following:

Year	Gross Receipts	Business Income	Adjusted Gross Income
1997	\$278,036	\$58,746	\$53,655
1998	\$233,169	\$55,463	\$46,554
1999	\$169,209	\$50,322	\$98,236
2000	\$120,604	\$ 49,267	\$53,480

The petitioner's response also included copies of the W-2s issued by the petitioner reflecting the wages paid to the beneficiary in 1999, 2000, and 2001. In those years, the petitioner paid the beneficiary \$11,007.56, \$10,516.22 and \$12,304.90, respectively. The petitioner failed to submit any tax return or evidence of its ability to pay the proffered wage reflecting its financial status during the year 2001.

In denying the petition, the director noted the absence of evidence showing the petitioner's financial status in 2001 and also concluded that the sole proprietor's reasonable living expenses would exceed the funds remaining after deducting the offered salary.

On appeal, counsel argues that the 2001 tax return was not available and that the petitioner had filed an extension of time (Form 2688) with the Internal Revenue Service. Counsel also contends that the petitioner's income was sufficient to meet the beneficiary's proffered wage.

The petitioner is organized as a sole proprietorship. It is not legally separate from its owner. In reviewing the petitioner's ability to pay the beneficiary's proffered salary, consideration must be given to the income and expenses actually generated by the sole proprietor. The record reflects that the sole proprietor's adjusted gross income exceeded the beneficiary's proposed salary in 1997 and 1998, and exceeded the difference between the proffered wage and the actual wages paid by the petitioner in 1999 and 2000. Three exemptions were claimed on the tax returns. The director assumed that the petitioner could not reasonably sustain himself and his dependents as well as pay the beneficiary's proffered salary. The director, however, failed to instruct the petitioner to provide his actual monthly living expenses to justify this assumption. An evaluation of this petitioner's ability to pay the proffered wage should include this information.

It is also noted that additional evidence contained in the record raises a question of whether the petitioner's documentation of the beneficiary's past work experience is sufficient to meet the requirements of the terms of the labor certification.

As indicated in Block 14 of the approved labor certification for a building maintenance repairer, the only experience required for the job is two years in the job offered. The record contains contrasting evidence related to this criterion. A July 24, 1997 letter from [REDACTED] indicates that the

beneficiary worked for him as a maintenance person involved in landscape maintenance, plumbing, air conditioning, electrical maintenance, fiberglass repair, wallpapering and ceiling pasting. The beneficiary's employment ran from February 1985 to May 1994. Counsel submitted a subsequent letter signed by the beneficiary dated November 14, 2001. It indicates that due to a computer error, the beneficiary's work history was mistakenly presented. By its own terms, the letter sought to amend the beneficiary's past work experience by stating that Mr. [REDACTED] employed the beneficiary as a full-time landscaper and that the beneficiary currently works for the petitioner as a full-time landscaper. This evidence raises questions as to whether the beneficiary established that he has two years of building maintenance experience, rather than several years as a full-time landscaper.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request additional evidence of the petitioner's actual monthly living expenses, financial documentation for 2001 and clarification of the beneficiary's relevant experience. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.